fact, then the courts instead of being astute to discover defects of jurisdiction (as it must be confessed they have in many of the American cases), should aim liberally to support the judgment of the tribunal agreed upon.

In the latest English case on this subject, *Hopkinson* v. *Marquis of Exeter*, Law Rep. 5 Eq. 63, the complainant being a member of the *Conservative Club*, had given pledge that he would vote for certain liberal candidates at the parliamentary election, and for this he was expelled from the club. The rules of the club made no reference to the political opinions of its members, except so far as they were implied from its name. Lord ROMILLY, M. R., refused to restore the complainant, on the ground that he had submitted to the jurisdiction of the club by becoming a member, and the proceedings had been regular according to the by-laws. A club, he said, was a partnership, but of a different kind from any other; and the members had by rules constituted a tribunal for the decision of questions of membership and expulsion. "The question is, whether there is any appeal from that decision. It is clear that every member has contracted to abide by that rule which gives an absolute discretion to two-thirds of the members present to expel any member. Such discretion, like that referred to by Lord ELDON in *White* v. *Damon*, 7 Ves. 35, must not be a capricious or arbitrary discretion. But if the decision has been arrived at *bonâ fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal."

It does not appear from the report whether the club was incorporated or not; but, putting the decision fairly on the contract of the member to abide by the judgment of the tribunal established by the by-laws, we are unable to perceive that the fact of incorporation is at all material.

If the decision in the principal case had been rested on the by-law quoted, and the regularity of proceedings under it, we think it would have stood on a basis of sound reason, and have been strictly within the *principle* of Lord MANSFIELD'S judgment in *Rex* v. *Richardson*. J. T. M.

Court of Appeals of Maryland.

NORTHERN CENTRAL RAILWAY CO. *v.* CANTON CO.[1]

Trade fixtures and buildings for trade, no matter how strongly attached to the soil or firmly embedded in it, are treated as personal property, and as such subject to removal by the person erecting them.

The road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; but under certain circumstances they may be trade fixtures, and be treated as personal property.

The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine, that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily

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[1] We are indebted for the opinion in this case to the Baltimore Law Transcript.—EDS. AM. L. R.

relinquished his claim in favor of the landlord. This presumption cannot arise, where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice.

THE Northern Central Railway Company, after the year 1855, and before 1859, constructed, at its sole cost and charge, a railway track upon the lands of the Canton Company, with the license and permission of the latter. In 1859 the appellee revoked the license under which the appellant was in possession of its land. This was followed, in 1860, by two suits, one an action of ejectment, and the other of trespass *quare clausum fregit*. During the pendency of these suits, which had been referred, by agreement, to an arbitrator, the appellant filed a bill for specific performance, and also praying for an injunction. The appellee was successful in having the bill dismissed, and recovered judgment in both actions at law. A subsequent action of ejectment was brought in January 1865, for the road bed, which had not been embraced in the previous ejectment suit. A judgment thereon was obtained in June following, and under a writ of *habere facias* possession was delivered to the appellee in October of the same year. The rails and other materials which formed a part of the railway constructed by the appellant under the circumstances above stated, were upon the land at the time, and the question arises who is the rightful owner of them.

The opinion of the court was delivered by

BRENT, J.—The fact that the rails had been taken up and severed from the soil shortly before the execution of the writ of possession is immaterial. If the appellant had no title to them while attached as a railway to the soil, the severance did not confer any.

The general rule of the common law certainly is, that whatever is fixed and annexed to the soil, becomes a part of it, and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases, in which the question arose, to form an exception, no matter how strongly attached to the soil or firmly embedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes* v. *Mawe*, 3 East 38, 2 Smith's L. C. 251, the earlier and more important decisions upon this subject

are very fully reviewed by Lord ELLENBOROUGH, and his conclusion from them, that trade fixtures and buildings for trade have always been recognised as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness* v. *Pacard*, 2 Peters 137, the exception is recognised by the Supreme Court of the United States, STORY, J., delivering the opinion, and the doctrine applied to a house, which had been erected as an accessory to the business of a dairyman, although it was occupied as the residence of his family, and those employed by him. It is also recognised and asserted in *Holmes* v. *Tremper*, 20 John. R. 29; *White's Appeal*, 10 Barr 252, and authorities there cited.

Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder, and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty, or is to be treated as personal property. In the notes to the cases of *Prince* v. *Case*, and *Rerick* v. *Kern*, 2 Amer. L. C. 747, it is correctly said the American courts "have repeatedly held that a house or other building will not be merged in the land on which it stands in consequence of the solidity of its structure, or the connection between it and its foundations; if the agreement of the parties, and the purposes of justice require, that the title to both should be kept separate, and that the owner of the house should have the right to enter for the purpose of using it as his own, or removing it." In the case of *Dame* v. *Dame*, 38 N. H. 429, this doctrine was applied to a house erected upon the land of another, and it was held to be but a personal chattel. It is also established by *Curtiss* v. *Hoyt*, 19 Conn. Rep. 154; *Wells* v. *Bannister*, 4 Mass. 514; *Barnes* v. *Barnes*, 6 Verm. 388; *Pemberton* v. *King*, 2 Devereux 376, and being personalty, it is governed by the same rules as any other personal property left by the consent of the owner of other land upon his premises: *Smith* v. *Benson*,

1 Hill 176. We consider the property in dispute in this case, as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of a railway company. It certainly was not accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would, or could have been used by the appellee as a railway. The conclusion cannot be avoided, that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company as a steam-engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *The Farmers' Loan and Trust Co.* v. *Hendrickson*, 25 Barb. 484, and cited with approval in 18 Md. 193, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; *primâ facie* a house, with its foundation planted in the soil, is real property; yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The

road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management, and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

The strict rule, which has been applied to tenants requiring them to remove fixtures which they hold as personal property, during the term, even if it was adopted by this court, does not apply to the present case. The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice. To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another.

If the property replevied did not belong to the appellee at the time the license to the appellant to be upon its land was revoked, it is not perceived how the subsequent suits between them could have changed the title to it. This property was not the subject of those suits. They had reference to the land only upon which it was, and determined no question of its ownership, inasmuch as it does not pass with the realty from the single circumstance of having been affixed to the soil.

Upon a careful review of the law and facts in this case, we cannot agree with the court below. We think the property in question belonged to the appellant, and the judgment below should be reversed.

Judgment reversed, and judgment for the appellant for the property replevied, and one cent damages and costs.

The foregoing decision affords another instance of the ingenious but rather disingenuous devices of courts, in making compensation for their own errors. The true and manly course, unquestionably, would have been to hold the license to

use the land for railway purposes, after it had been executed by laying a track, as irrevocable, on the same grounds that oral contracts for the sale of land have been enforced in courts of equity. But there has been a great deal of ingenious refinement to escape from any such sensible and natural course. And the latest one is, that while any one who stands by and allows another to build *upon his own land*, to the obstruction of any incorporeal right of the person thus acquiescing, he will be precluded from thereafter interposing any obstacle to the use and continuance of such obstruction; that no such consequence follows even an express license to build on the land of another by the owner: *Dyer* v. *Sanford*, 9 Met. 395, and cases cited.

We know there is a great deal of learning expended to show the distinction between allowing such license to operate upon corporeal and incorporeal interests in land, and how the one is more in conflict with the Statute of Frauds than the other. But the truth is, that both are in direct conflict with that statute, and so is a decree of specific performance on the ground of part-performance. But if fraud will justify a court of equity in denying the perpetrator the shield of an express statute in one case, it certainly will in all cases. And the refusal to extend it to all analogous cases, as is done in making this distinction between licenses executed upon the land of the licensor and that of the licensee, is without any just foundation, or ground to stand upon. And the same rule has been extended to a license executed on the land of a third party, which was held irrevocable: *Curtis* v. *Noonan*, 10 Allen 406. The distinction is here made between *acquiring* and *abandoning* an easement in land; that the one cannot be done by oral license, but the other may be. But the distinction is rather thin and shadowy. An existing easement in land can only be regarded as an interest in the realty, and of equal importance only with one of equal extent to be thereafter created. The former cannot be abandoned by the owner without passing to some other, not perhaps as a distinct easement, but as an interest in the land. The absolute owner of land is no more affected in his title by the creation of an easement in the land, than he is by the destruction of the same easement thereafter; so that it is allowing ourselves to be cheated by a very thin disguise to affect to believe, that the creation of an easement in land by parol, is any more in conflict with the Statute of Frauds than its abandonment.

And the calling a railway a temporary fixture for the purposes of trade, is better than no redress in so palpable a wrong as the present case presents; but, after all, it is curing one blunder by another scarcely less flagrant. But we admit it is better than no remedy. We would go back and find where the train first left the track, and there apply the cure. I. F. R.